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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PAUL SOJAI, Plaintiff and Appellant, v. DANICA SOLOMON et al., Defendants and Respondents.	B285801 Los Angeles County Super. Ct. No. VC062704

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert B. Broadbelt III, Judge. Affirmed.

Paul Sojai, in pro. per., for Plaintiff and Appellant.

Freeman Mathis & Gary, Rebecca J. Smith, Kristin A. Ingulsrud; Mandell, Damon & Associates and Barbara J. Mandell for Defendants and Respondents.

Plaintiff Paul Sojai appeals from a summary judgment in favor of defendants Danica Solomon and Natalie Small. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In January 2013, plaintiff sued defendants for injuries he allegedly sustained in a pile-up automobile accident involving a vehicle owned by Small and driven by Solomon. His complaint charged defendants with motor vehicle and general negligence, and claimed compensatory damages according to proof.

On July 6, 2016, plaintiff began representing himself after the trial court granted his attorney's motion to be relieved as counsel.[1]

On September 1, 2016, defendants served plaintiff with requests for admission and form interrogatories. Among other things, the requests asked plaintiff to admit the accident was "not the result of [defendants'] failure to use reasonable care," and to admit the accident "did not result in any type [of] harm to [plaintiff] whatsoever." A form interrogatory asked plaintiff to state and identify, "for each response that is not an unqualified admission," all facts and documents supporting the denial. Plaintiff failed to serve timely responses.

After attempting to meet and confer with plaintiff, defendants moved to compel responses to the form interrogatories and to have the facts in the requests deemed admitted. Plaintiff

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[1] The motion to be relieved as counsel followed a series of stipulated trial continuances and plaintiff's successful motion for relief from dismissal. The trial court had dismissed the matter after plaintiff's attorney failed to appear for the previously scheduled final status conference and trial.

did not oppose the motions or appear for the noticed hearing. The court granted the motions. On November 28, 2016, defendants served plaintiff with notice of the ruling.

On February 28, 2017, defendants moved for summary judgment based on the deemed admissions. Plaintiff did not file an opposition or responsive declaration.

On May 18, 2017, the trial court held a hearing on defendants' summary judgment motion. Before the hearing, the court distributed a tentative ruling proposing to grant the summary judgment motion on the grounds that (1) plaintiff, by his deemed admissions, conceded defendants did not breach a duty of care or cause him any injuries; and (2) plaintiff failed to file an opposition or responsive declaration demonstrating a triable issue of fact.

According to the parties' settled statement, as corrected and modified by the court after a hearing (Cal. Rules of Court, rule 8.137(f)(4)(A)), plaintiff confirmed he had received defendants' summary judgment motion, he did not file an opposition or responsive affidavit, and he had received and read the court's tentative ruling. Plaintiff presented oral arguments, "which were not testimony given under oath," recounting his version of the car accident. His argument conflicted in critical ways with a police report of the accident and the facts that were deemed admitted under the court's order.[2] He also claimed he

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[2] Defendants offered the police report as evidence in support of their summary judgment motion; plaintiff did not object to its admissibility. At the hearing, plaintiff argued defendants were driving the last car involved in the pile-up collision, while the police report stated a fourth car had rear-ended defendants' car,

was "threatened by the defendants' attorney," and he "believe[d]" the attorney must have threatened another driver involved in the accident. And plaintiff claimed, contrary to his deemed admissions, that he suffered from "severe neck and back pain" since the accident.

After hearing argument, the trial court adopted its tentative ruling. Plaintiff filed a timely notice of appeal from the judgment.

DISCUSSION

Plaintiff argues the court improperly denied him a continuance to gather additional discovery to oppose the summary judgment motion. He also argues defendants failed to demonstrate they were entitled to judgment as a matter of law. Neither contention has merit.

1. *Standard of Review*

Summary judgment is properly granted if all the papers submitted show no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849; *Sanchez v. Kern Emergency Medical Transportation Corp*. (2017) 8 Cal.App.5th 146, 152.)[3] A defendant meets its burden by showing that one or more

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causing it to collide with the car that rear-ended plaintiff. Plaintiff argued the highway patrol officer who prepared the report "clearly fell for [Solomon's] appearance" when the officer arrived, and the officer "coached" Solomon to fabricate a story that shifted blame for the accident to the fourth vehicle, which had fled the scene.

[3] Statutory references are to the Code of Civil Procedure.

essential elements of the plaintiff's cause of action cannot be established, or that there is a complete defense. (§ 437c, subd. (o); *Aguilar,* at p. 849; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768; *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741.) " 'When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.' " (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 931–932.) We review a trial court's ruling granting summary judgment de novo. (*Saelzler,* at p. 768.)

2. *Plaintiff Did Not Request a Continuance*

Section 437c, subdivision (h) provides: "If it appears from the *affidavits submitted in opposition to a motion for summary judgment* . . . that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just." (Italics added.) Plaintiff concedes he was not entitled to a continuance under the statute because he failed to submit an affidavit in opposition to defendants' motion.

"Where a plaintiff cannot make the showing required under section 437c, subdivision (h), a plaintiff may seek a continuance under the ordinary discretionary standard applied to requests for a continuance. [Citation.] This requires a showing of good cause." (*Hamilton v. Orange County Sheriff's Dept*. (2017) 8 Cal.App.5th 759, 765 (*Hamilton*).) In deciding whether there is good cause to continue a summary judgment motion, "courts consider various factors, including (1) how long the case has been pending; (2) how long the requesting party had to oppose the motion; (3) whether the continuance motion could have been

made earlier; (4) the proximity of the trial date or the 30-day discovery cutoff before trial; (5) any prior continuances for the same reason; and (6) the question whether the evidence sought is truly essential to the motion." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 644; *Hamilton,* at p. 765.)

Plaintiff argues the trial court should have granted him a continuance under the discretionary standard. Critically, however, he has not presented a record showing he made a request for continuance, let alone a request supported by a "showing of good cause."[4] (*Hamilton, supra,* 8 Cal.App.5th at p. 765.) Absent such a request, we cannot find the trial court abused its discretion by ruling on the noticed summary judgment motion. (See, e.g., *People v. Visciotti* (1992) 2 Cal.4th 1, 48 [absent "timely objection . . . , any claim of abuse of discretion is deemed to have been waived"].) Plaintiff has not established reversible error. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–

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[4] Apart from the settled statement of the summary judgment proceeding, the record contains an email from plaintiff to defendants' counsel purporting to respond to the court's tentative ruling. Although plaintiff contends the email shows he requested a continuance of the summary judgment hearing, the email is dated June 19, 2017—more than a month after the hearing—and it was filed with the court on June 30, 2017. In any event, the email does not contain a request for continuance. While it relates plaintiff's version of the facts, largely tracking plaintiff's argument in the settled statement, it does not make any reference to a request for continuance. It merely asserts: "We are requesting your honor to give us our rightful day in court, before the judge and the jury, since the defendant has shown no [sign] of [a] desire to settle the case."

609 [an appealed judgment is presumed to be correct, appellant has the burden to overcome the presumption by providing an adequate appellate record demonstrating the alleged error].)

3. *The Deemed Admitted Facts Establish Defendants Were Entitled to Judgment as a Matter of Law*

Under section 2033.280, "[i]f a party to whom requests for admission are directed fails to serve a timely response, . . . [t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted." (*Id.*, subd. (b).)[5] "The court *shall*

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[5] Prior to 1987 and the enactment of the Civil Discovery Act, a party propounding requests for admission was required to include a warning that noncompliance would result in the requests being deemed admitted. (*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 775 (*St. Mary*).) "[I]n the event timely responses were not served and the propounding party then served a statutory notice that the [requests] had been deemed admitted, the nonresponding party would then have 30 days to make a motion for relief from default under section 473 to avoid the [deemed admissions] becoming binding admissions." (*Ibid.*, citing *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979 (*Wilcox*).) "This practice, however, was problematic because it: (1) was too 'draconian' and 'imposed a sanction for nonresponse or tardy response that [was] out of all proportion to the abuse of discovery'; and (2) created no incentive for a party willing to make the admissions to serve an actual response." (*Wilcox,* at pp. 979–980.)

Under the Civil Discovery Act's current procedure, "a propounding party must take affirmative steps—by bringing a formal 'deemed admitted' motion—to have [requests] to which timely responses are not received deemed admitted." (*St. Mary, supra,* 223 Cal.App.4th at pp. 775–776; § 2033.280, subd. (b).)

make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission." (*Id.*, subd. (c), italics added.) " '[A] deemed admitted order establishes, by judicial fiat, that a nonresponding party has responded to the requests by admitting the truth of all matters contained therein.' " (*St. Mary, supra,* 223 Cal.App.4th at p. 776, quoting *Wilcox*, *supra*, 21 Cal.4th at p. 979.) "Any matter admitted in response to a request for admission is *conclusively established* against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under Section 2033.300." (§ 2033.410, subd. (a), italics added.)

Consistent with the mandate in section 2033.280, subdivision (c), the court made an order deeming plaintiff to have admitted the matters specified in defendants' requests for admission, including that the accident was "not the result of [defendants'] failure to use reasonable care" and that the accident "did not result in any type [of] harm to [plaintiff] whatsoever." Based on these deemed admissions, the court concluded no triable issue of material fact existed and defendants were entitled to judgment as a matter of law. (See § 437c, subd. (c).) Because the deemed admissions conclusively establish defendants' right to summary judgment, we cannot reverse the judgment unless plaintiff can demonstrate the deemed admitted order should have been set aside. (Cf. *Wilcox, supra,* 21 Cal.4th at p. 977 [because deemed admitted order supported summary judgment, appellate review was limited to whether plaintiff was entitled to statutory relief from the order].)

Under section 2033.300, a party may withdraw or amend an admission "only on leave of court granted after notice to all parties." (*Id.*, subd. (a).) "The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits." (*Id.*, subd. (b).)

In his appellate briefs, plaintiff appears to argue his failure to respond to defendants' requests for admission was the result of excusable neglect. He states he was "unrepresented at the time" defendants moved to have the requests deemed admitted and he was "unfamiliar with legal concepts and procedures." He also claims defendants' attorney "misle[d]" him about defendants' willingness to settle the case and, as a result, he had "not viewed the falsified evidence and admissions" supporting the summary judgment motion.[6] And he maintains the argument he presented at the summary judgment hearing, including his version of how the car accident occurred and his statements about the damages he suffered, was sufficient to raise a triable issue of material fact.

Because plaintiff did not make a noticed application to have the deemed admissions withdrawn under section 2033.300, the trial court properly treated the admitted facts as conclusively established against him. (§ 2033.410, subd. (a) [a deemed admission is "conclusively established . . . , unless the court has permitted withdrawal or amendment of that admission under

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[6] Plaintiff's remark about "falsified evidence" appears to refer to the police report defendants filed in support of their summary judgment motion.

Section 2033.300"].) While we are sympathetic to the challenges facing plaintiff as a pro. per. litigant, the fact that he is representing himself does not diminish his burden to follow the statutorily mandated procedure. The law permits a party to act as his own attorney; however, " '[s]uch a party is to be treated like any other party and is entitled to the same, but no greater[,] consideration than other litigants and attorneys. [Citation.]' [Citation.] Thus, as is the case with attorneys, pro. per. litigants must follow correct rules of procedure." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) Under the statutory framework, the trial court was authorized to permit withdrawal of the admissions "*only*" if, "after notice to all parties," the court determined the admissions were the result of excusable neglect and defendants would not be prejudiced in defending the case. (§ 2033.300, subds. (a) & (b), italics added.) Without the requisite noticed application from plaintiff, supported by a showing of excusable neglect, the trial court did not have discretion to treat the deemed admissions as anything other than "conclusively established" facts. (§ 2033.410, subd. (a).) Thus, notwithstanding plaintiff's arguments at the summary judgment hearing, the court properly concluded there were no triable issues and defendants were entitled to judgment as a matter of law. (See § 437c, subd. (c).)

DISPOSITION

The judgment is affirmed. Defendants Danica Solomon and Natalie Small are entitled to their costs.

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EGERTON, Acting P.J.

We concur:

DHANIDINA, J.

EPSTEIN, J.*

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* Retired Presiding Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.